



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Wesonga v Bhudia & another (Civil Suit 474 of 2020)  
[2022] KEMC 46 (KLR) (1 April 2022) (Judgment)**

Neutral citation: [2022] KEMC 46 (KLR)

**REPUBLIC OF KENYA  
IN THE KIAMBU LAW COURTS  
CIVIL SUIT 474 OF 2020  
SK MOTARI, RM  
APRIL 1, 2022**

**BETWEEN**

**CATHERINE ANYIMI WESONGA ..... PLAINTIFF**

**AND**

**SHANTI RAMJI BHUDIA ..... 1<sup>ST</sup> DEFENDANT**

**RAMAN ENTERPRISES ..... 2<sup>ND</sup> DEFENDANT**

**JUDGMENT**

1. The Plaintiff in this matter instituted this suit by way of a Plaint dated 28/09/2020 seeking orders inter alia general and special damages for injuries she claims to have sustained on or about the 23/09/2017 while lawfully travelling in motor vehicle reg. no. KAU 675X along Ruaka-Kahawa West road when motor vehicle reg. no. KBY 516Q Tata Lorry was negligently driven/managed/controlled by the Defendant or Defendants' driver/agent/servant that it caused an accident and caused the Plaintiff serious injuries.
2. The Defendants failed to enter appearance or file defence within the stipulated period. Interlocutory judgment was entered against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants on the 28/10/21 on the basis of the Affidavit of Service of Japheth Kabogoi, a court process server, sworn on the 12/08/2021.
3. The matter was listed for formal proof hearing on the 03/03/2022. The Plaintiff filed an Affidavit of Service by Japheth Kabogoi sworn on the 08/01/2022 evidencing that they served the formal proof hearing date upon the Defendants through postal address. At the hearing, the Plaintiff testified as PW1, adopted her statement filed on 13/10/2020 as her evidence in chief and produced documents as per the Plaintiff's list of documents dated 28/09/2020 as exhibits in support of her case.
4. The Plaintiff further filed submissions dated 03/03/2022 on the 04/03/2022.



5. I have considered the pleadings, testimony, exhibits produced and submissions filed in this matter. I proceed and make a determination in this matter under the following heads:

### **Liability**

6. The Defendants did not defend this matter and thus interlocutory judgment was entered against them. The court having been satisfied that the Defendants had been served with Summons to Enter Appearance and failed to do so, entered interlocutory judgment against them under the provisions of Order 10 Rule 6. The entry of such a judgment indicated that the Plaintiff's suit had on a prima facie level, a cause of action, however, the Plaintiff still had to discharge his burden of proof which is why the matter went for formal proof, see Julius Munga Ndungi v John Maina [2020] eKLR. The particulars of negligence as pleaded in the plaint needed to be proved which was to be done by way of evidence at the formal proof.
7. In her Plaint, the Plaintiff pleaded under paragraph 5 as follows;
- ‘That on or about the 23<sup>rd</sup> September, 2017 the Plaintiff was lawfully travelling in motor vehicle registration no. KAU 675X along Ruaka-Kahawa West road or thereabout when the Defendant or defendant's driver/agent and/or servant so negligently drove managed and/or controlled the said motor vehicle registration no. KBY 516Q Tata Lorry, that he caused, and/or permitted the same to cause the accident thereby causing the Plaintiff serious injuries.
8. Particulars Of Negligence Of The Defendants, Their Driver Servant, Employee And/or Agent
- a. Driving at an excessive speed in the circumstances
  - b. Causing or permitting the said motor vehicle registration number KBY 516Q to cause injuries
  - c. Failing to stop, slow down, swerve or in any other way so as to manage or control the said motor vehicle so as to avoid the accident
  - d. Failing to maintain any or any proper care and control of the said motor vehicle
  - e. Causing the accident'
9. At the formal proof hearing of this matter, the Plaintiff adopted her statement as evidence in chief. In her witness statement, the Plaintiff indicated to have sued the Defendants herein because of a road traffic accident involving the defendants' motor vehicle registration no. KBY 516Q Tata Lorry driven by the 1<sup>st</sup> Defendant or the defendant's driver, servant and/or agent, that happened along Ruaka-Kahawa West road or thereabouts. She stated that on 23/09/2017 at around 1600hrs she was a passenger in KAU 675X when motor vehicle reg. no. KBY 516Q was driven along said road at high speed that it veered off the road and caused an accident. She further averred that the driver appeared to have lost control of the said vehicle due to high speed. She blamed the driver of the motor vehicle for causing accident as he drove the vehicle negligently, without due care and attention and carelessly.
10. The Plaintiff produced a Police Abstract dated 16/10/2017 (P-Exhibit 1). The Police Abstract indicated that matter was pending under investigation. The Police Abstract indicates accident to have involved motor vehicle reg. no. KAU 675X and motor vehicle reg. no. KBY 516Q and the Plaintiff herein as a passenger.
11. I note that the Plaintiff only sued Defendants in regards to motor vehicle reg. no. KBY 516Q. In her pleadings, the Plaintiff did not plead how the negligence of the Defendants occasioned her injuries pleaded in her Plaint. I also note that there is no testimony or exhibit that was produced to this court



to show or explain the circumstances in which the accident occurred. The Police Abstract only shows that an accident occurred but does not shed light as to how it occurred. The Plaintiff avers to have been travelling in motor vehicle reg. no. KAU 675X but no evidence was produced to show how the said vehicle was involved in the accident or what happened until the Plaintiff sustained injuries on the fateful date. There is no connection explained as to how the negligence of motor vehicle reg. no. KBY 516Q resulted to the Plaintiff suffering damages yet she was travelling in a different motor vehicle.

12. Section 107 of the [Evidence Act](#), Chapter 80 Laws of Kenya provides that:-

- (1) Whoever desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts must prove that those facts exist.
- (2) When a person is bound to prove the existence of any fact it is said that the burden of proof lies on that person.

13. I find that the Plaintiff gave no evidence as to what role the Defendants' played in the occurrence of the accident in question that led to her injuries. She simply blamed the motor vehicle reg. no. KBY 516Q. The Plaintiff did not plead particulars of negligence against the Defendants that showed how their negligence occasioned her injuries and also failed to tender evidence to prove the same. It is therefore the conclusion of this court that the Plaintiff did not discharge his burden of proof on the issue of liability as against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.

### **Quantum**

14. It is trite law that there is as yet no liability without fault in the legal system in Kenya, and a plaintiff must prove some negligence against the defendant where the claim is based on negligence, see *Kiema Mutuku –Vs- Kenya Cargo Hauling Services Ltd 1991*. I have already established that the Plaintiff failed to prove liability as against the Defendants in this matter and thus he is not entitled to an award on quantum. However, it is the practice that the court assesses damages that it would have awarded in the event liability had been proven. I thus proceed and quantify the Plaintiff's case as follows:

### **General Damages**

15. The Plaintiff has pleaded in the Plaint at paragraph 7 to have sustained injuries namely blunt injuries (tender) to the chest anteriorly and bruises to both legs. The P3 Form (P-Exhibit 6) signed on the 16/10/2017 confirmed the pleaded injuries and further classified the injuries as 'harm'. The Medical Report by Dr G.K. Mwaura dated 18/09/2020, which was filed approximately three years post-accident in question also confirmed the pleaded injuries and classified them as soft tissue injuries. The plaintiff was found to have healed at the time of the examination but complained of pain on chest on exertion. According to the Plaintiff, she was treated at Kiambu Level 4 Hospital and St Joseph Mukasa Mission Hospital.

16. The Plaintiff submitted that an award of Kshs 250,000 is sufficient under the head of general damages. She relied on the case of *Habiba Abdi Mohammed vs Peter Maleye [2000]Eklr*, the case of *Francis Ochieng & Ano' vs Alica Kajimba [2015]KLR* and the case of *George O. Obare & Ano' vs Fransisca Tavitha Mbuvi Machakos H.C.C.A 42 of 2009*. The Plaintiff failed to avail a copy of the actual judgment for the case of *George O. Obare & Ano' vs Fransisca Tavitha Mbuvi, supra*, to guide the court. The Plaintiff in *Habiba Abdi Mohammed vs Peter Maleye, supra*, was admitted in hospital and only got discharged to save on costs. In the current case there is no evidence presented to show Plaintiff was ever admitted in hospital due to the subject injuries. In *Francis Ochieng & Ano' vs Alica Kajimba, supra*, the Respondent had sustained cerebral contusion with loss of consciousness of two hours, massive hematoma on the right parietal head, subconjunctual hematoma of the right eye, peri-



orbital hematoma, per-orbital ecchymosis, nukial stiffness, cut wound on the right hand and the right knee, and the Respondent was also admitted in hospital. The injuries in the referred case though soft tissue in nature, are more severe than those suffered by the Plaintiff in the matter herein.

17. In my determination I have further made reference to the case of FM (Minor suing through Mother and next friend MWM) v JNM & another [2020] eKLR whereby the appellant sustained injuries namely blunt object injury to the head, neck, thorax, abdomen and limbs. The court awarded an award of Kshs. 100,000/= for general damages. In the case of Caroline Chepkemoi Chelule v John Kung'u & another [2022] eKLR the Appellant sustained soft tissue injuries in the form of tenderness on the neck, back and on both hands and the High Court assessed general damages at Kshs 100,000. The forgoing are appeal cases.
18. Taking into consideration the nature of injuries suffered by the Plaintiff in this case, the passage of time and rate of inflation, I find that an award of Kshs 120,000 would have been sufficient under the head of general damages if the Plaintiff had discharged his burden of proof on liability.

### **Special Damages**

19. The law is quite clear on the head of damages called special damages. Special Damages must be both pleaded and proved, before they can be awarded by the Court. In Capital Fish Kenya Limited v The Kenya Power and Lighting Company Limited[2016] eKLR, the Court of Appeal stated:

It is trite law that special damages must not only be specifically pleaded, they must also be strictly proved with as much particularity as circumstances permit.”

20. The same court reiterated that position in Provincial Insurance Co. EA Ltd v Mordekai Mwangi Nandwa, KSM CACA 179 of 1995 (ur), that:

It is now well settled that special damages need to be specifically pleaded before they can be awarded. Accordingly, none can be awarded for failure to plead.”

21. The Plaintiff pleaded special damages under paragraph 9 of his Plaint as follows;

- a. Medical Report Kshs 3,000.00
- b. Treatment Expenses Kshs 1,520.00
- c. Motor vehicle search Kshs 550.00

Total Kshs 5,070.00

22. At the hearing of this matter, the Plaintiff produced receipts as P-Exhibit 7 the same being Medical Report receipt of Kshs 3,000, receipts from Kiambu District Hospital totaling to Kshs 620 and receipts from St Joseph Mukasa Dispensary totaling to Kshs 2,455. The Plaintiff also produced as P-Exhibit 4 a Copy of Records for motor vehicle reg. no. KBY 516Q and Invoice Paid for Kshs 550. I find that the Plaintiff has discharged her burden of proof to the required standard of special damages to the tune of Kshs 5,070. I would thus have awarded the Plaintiff the pleaded amount of Kshs 5,070.

### **Conclusion**

23. The upshot therefore is that I hereby dismiss the Plaintiff's case with no orders as to costs.  
It is so ordered.

**DATED AND DELIVERED AT KIAMBU THIS 1<sup>TH</sup> DAY OF APRIL, 2022**



.....

**S.K. MOTARI**

**RESIDENT MAGISTRATE**

In the presence of:-

KIAMBU CIVIL SUIT 474 OF 2020	0
-------------------------------	---

